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Chapter 6

Incapacitation by Pre-Trial Detention

Lonneke Stevens

Introduction: The Illusion of the Last Resort Principle

Pre-trial detention is the deprivation of liberty of suspects awaiting their trial. Traditionally, it has been a measure to secure the presence of a suspect during investigation and trial. Pre-trial detention is considered a necessary evil. Evil, because a yet innocent person is imprisoned. Necessary, because it serves the need for an effective criminal procedure.

Necessary but evil, the long standing maxim, holds that pre-trial detention should only be employed as a last resort. Whenever possible, the use of pre-trial detention should be avoided by imposing alternative measures. These standards are found in the United Nations' Tokyo Rules,¹ and in the case law of the European Court of Human Rights.

Referring to the presumption of innocence, the Court holds that a suspect should, in principle, await his trial in freedom.² The presumption of innocence in this respect is a procedural safeguard instructing authorities that yet innocent individuals should be treated as such. Practice, however, shows otherwise. International reports on excessive use of pre-trial detention are published regularly.³ Within the European Union, the mean rates of untried prisoners tend to go up rather than down (Van Kalmthout et al. 2009, Stevens 2009). Legal principle thus seems to be having a hard time guiding legal practice, or as I will argue, legal practice has even abandoned the principle of last resort.

The line of my argument will be that the use of pre-trial detention is guided by the authority's aspiration to respond to crime speedily and effectively. Suspects are pre-detained for reasons of prevention and retribution. The aim of prevention especially places today's use of pre-trial detention within the theme of this book.

1 See rules 6.1 and 6.2 of the United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules). Adopted by General Assembly Resolution 45/1110 of December 14, 1990. For an overview of United Nations and international standards on pre-trial detention, see: *Human Rights and Pre-Trial Detention: A Handbook of International Standards Relating to Pre-Trial Detention*, United Nations, New York/Geneva 1994.

2 See, for example, European Court of Human Rights (ECHR) July 24, 2003, appl. no. 46133/99 and 48183/99 (*Smirnova v. Russia*).

3 Up-to-date information can be found in the World Prison Brief Online (ICPS), www.kcl.ac.uk/depsta/rel/icps/worldbrief.

Incapacitation by pre-trial detention means that people are efficiently (that is, quickly and with a minimum of procedure) prevented from continuing criminal behavior. For reasons I will explain in the following sections, I will refer to this usage of pre-trial detention in terms of a "punitive pre-trial detention" and pre-trial detention as "pre-punishment."

My perspective on pre-trial detention will primarily be based on my own research into Dutch practice. Findings resulting from the Dutch research will be complemented by available data from other countries. Regarding the Dutch research, I will first discuss arguments used by the Dutch judiciary for pre-detaining suspects. In the following sections, I elaborate on the idea that pre-trial detention is a way of incapacitating and immediately punishing suspects.

I will then go on to discuss the relationship between pre-trial detention and prison sentences. It will be argued that pre-trial detention means not only "immediately punished" but also "finally punished." I will then situate the "pre-punishment" idea against the background of legislative initiatives of the Dutch legislature. Next, I extend the contemporary Dutch concept of pre-trial detention to the situation of other Western societies. Finally, concluding observations will follow.

Judicial Argumentation for Pre-Detaining Suspects

The Interviews

In 2008 and 2009, I interviewed 28 Dutch judges of seven Dutch courts. The interviews were held according to the semi-structured interviewing method. Judges were asked to comment on five cases: would they pre-detain this suspect and why (not)?

The case descriptions themselves were rather short. They were meant to initiate discussion on all possible circumstances that could matter in a pre-trial decision. The case descriptions were also designed in such a way that an affirmative answer to the question whether the suspect should be detained was not self-evident and was open to debate over whether there would be a *ground* for pre-trial detention.

Besides this requirement of grounds, Dutch law basically holds that pre-trial detention can only be ordered when the crime committed is serious to a certain extent and in case there are "grave suspicions." Judges were told that they could assume these requirements were met. It is relevant in this context that Dutch law recognizes four grounds for pre-trial detention: the risk of a seriously shocked legal order, the risk of flight, the risk of repetition, and the risk of collusion.

The interviews were primarily aimed at getting information on two of the most discussed grounds for pre-trial detention, the "risk of re-offending" (also: "risk of repetition") and the "seriously shocked legal order." Two cases were written for discussion of the risk of re-offending (the second and third cases mentioned below) and three cases relating to the seriously shocked legal order (cases one, four and

five). The interview was, however, not limited to discussing these grounds but as said, aimed at a general discussion of the what, why and how of pre-trial detention.

The cases that were used can be summarized as follows. The first case dealt with a nighttime rape by a first offender, the second was about a long-running feud between neighbors, resulting in a fight and (severe) injuries for one neighbor. The third case involved a petty crime by an (ex-)junkie who had a long criminal record but had not committed crimes for more than a year. The fourth concerned a confused husband and father shooting at the family house bedroom window, and the fifth case described a small grocer in financial need importing 3 kilos of cocaine.

The Argumentation: Pre-Trial Detention Means "Already Punished"

The Ever-Present Risk of Re-Offending

One of the striking results of the interviews was the way the judges in all cases always seemed to find the ground "risk of re-offending"—even when the case was written so as not to contain it. The most obvious argument to substantiate the risk of repetition is usually the existence of a criminal record.

According to the case law of the European Court of Human Rights, other arguments can be found in a variety of circumstances such as, among others, the fact that a suspect is part of a criminal organization,⁴ the professional *modus operandi* of the crime committed (with regard to a fraud crime),⁵ and drug and alcohol addiction or mental illness of the suspect (for example, in relation to violence or sex offenses).⁶

The European case law already indicates that the risk of repetition has a wide range. It can be established by many different circumstances. Indeed, the versatility of the ground emerged from the interviews as well. With regard to the first case, the risk of re-offending was found in the character of the offense (a brutal rape does usually not happen only once), in its incomprehensibility and the fact that normal people would not do such things (there must be something wrong with this man; he might well do it again). The same arguments were brought up with regard to the case in which the frustrated father fired a gun at the bedroom window.

Furthermore, being neighbors while having a feud also constitutes a risk of re-offending, and having financial need is enough to expect one import of three kilos of cocaine to be followed by another. Noteworthy is the role that the seriousness or dangerousness of the offense committed played in determining a risk of repetition. This came to the fore in all the cases that involved some form of violence. One judge for example said:

4 See, for example, ECHR August 24, 1998, appl. no. 27143/95 (*Contrada v. Italy*).

5 For example: European Commission on Human Rights April 13, 1994, appl. no. 20055/92 (*Moser v. Austria*).

6 See, for example, ECHR October 1993, appl. no. 19569/92 (*E.A. v. Austria*), ECHR April 23, 1997, appl. no. 17391/90 (*Eriksen v. Norway*).

This is so disproportionate and dangerous that it would be a good thing to not let this man walk free for a while.

It seems only human that a judge would not want a grave risk to materialize. Hence, the magnitude of the risk of re-offending a judge will accept in case of a serious crime will probably be smaller than the risk he will take regarding a suspect prone to repeat a less serious crime. A risk of re-offending will therefore more readily be accepted as a ground for pre-trial detention in case of suspicion of a serious crime. The Dutch judges, however, do something different. Their establishment of the risk of repetition (thus: that a crime will probably be committed) simply coincides with the establishment that a serious crime has been committed. The risk of repetition in those serious cases is nothing more than the saying "once a thief always a thief." One judge also acknowledged this:

You do indeed use the ground of repetition improperly since you deduce it from the dangerous character of the offense committed itself.

In short, the crime committed itself and its accompanying scenario seem to be an endless source of circumstances that can substantiate a risk of repetition. This means that the risk of repetition is not a very well-defined ground for pre-trial detention, and consequently has a huge potential. This potential was mentioned by various judges interviewed. Not only did they acknowledge the wide scope of the ground, they also pointed out that they make use of it. As one judge said:

The ground of recidivism is actually more like a garbage pail; we use it when we do not have anything else.

Another judge formulated it this way:

The risk of repetition is usually the ground in case you do not have anything else. You invent it. It is a safety net. That is not fair and it is not what the legislature intended.

These quotes indicate that the risk of re-offending is there when you want it to be. It also means that, as a result, other arguments for pre-trial detention—that is, other than the ones recognized by the legislature—get free range. In sum, the risk of re-offending is always present, even when it is not.

Focus on Adjudication, Prevention and Retribution

The inventive use of the risk of repetition and the fact that it is there when you want it to be indicate that there are arguments for pre-detaining suspects that deviate from the legally recognized grounds. Indeed, a wide array of arguments cropped up during the interviews. All of them together nonetheless created a single

idea: when judges pre-detain suspects they are actually already settling the case. This can be demonstrated by the following quotes.

... the question is whether you think the case has to be settled immediately. I am not in favor of such an approach but I am part of a system ... Our system is aimed at taking as many suspects into pre-trial detention as possible.

Thus you are thinking of how much punishment will finally be imposed on someone, so you let him do his time now; he will then be done by the time he is sentenced ... sometimes it is smart to imprison and act a little in advance because then you have a trial within 90 days ... Sometimes you just need to be practical.⁷

It thus appears that judges value a quick settlement of the case and that pre-trial detention is the instrument to achieve it. The swift response to the crime furthermore seems to serve two of the goals that are usually connected to punishment after conviction. A prison sentence is meant as retribution for a crime committed. It also aims at preventing the perpetrator from doing further harm. Exactly these two purposes—retribution and special prevention—are reflected in the arguments the judges put forward for pre-detaining suspects:

You just want society to be rid of this man for a while. You do not just let people go who commit such crimes. This is too serious. This man just needs to be locked up for a while. It is in the interest of society that he is not free, and this man has to understand that he is not getting out soon.

The purpose of special prevention—releasing society, seriousness of the offense—can be seen in both quotes. The argument seems to be closely connected to the interpretation of the risk of re-offending—seriousness of the offense, not wanting to let a suspect walk free—as described previously. Indeed, the risk of re-offending has typically been one of the more “punitive” grounds for pre-trial detention. The ground aims at a proper conduct of the trial in the sense that justice is not seen to be done when a suspect commits other crimes while awaiting his trial. But with that, and unlike the risk of flight or the risk of collusion, the ground is inherently connected to the general criminal purpose of special prevention.

Since this purpose is normally pursued by the punishment of the criminal after conviction, the risk of repetition is called a “punitive” ground for pre-trial detention. This punitive character is accepted on condition that the ground is specified by law and substantiated by the circumstances of a case (Groenhuijsen 2000). That way, the risk of repetition remains focused on the proper conduct of the trial, on procedure itself. The broad interpretation of the ground, however, seems to have evolved into

7 The Dutch Code of Criminal Procedure prescribes that after the first period of 14 days of pre-trial detention, the second period may not exceed 90 days. The trial must have started within that period.

the trial independent argument mentioned above. Pre-trial detention is used for incapacitation of suspects and an immediate retribution of the crime.

Consequently, the idea of pre-trial detention as a provisional measure concerning yet innocent individuals is weakened. Pre-trial detention becomes a rather final measure; like punishment after conviction. In this sense, suspects are already or "pre-punished." Pre-trial detention in a way replaces or accelerates the punishment that would finally have been given by the trial judge.

Pre-Trial Detention Is "Finally Punished"

The arguments for pre-trial detention discussed above indicated that pre-trial detention functions as "pre-punishment" in the sense that the system is focused on adjudication and pre-detains suspects for reasons—most prominently the incapacitation of suspects—normally connected to imprisonment after conviction. Pre-trial detention mainly aimed at settling the case may have an effect on the eventual sentencing decision. This indeed emerges from an argument several judges mention. The argument holds that if a suspect has not been put in pre-trial detention, it is less likely he will receive a prison sentence:

If someone is a free man you usually think twice before giving him a prison sentence. It is an extra threshold.

Besides this judicial argumentation, the actual effect of pre-trial detention on sentencing can be demonstrated by figures on the relationship between pre-trial detention and prison sentence.⁸ Therefore it is necessary first to look at the development of prison sentences and pre-trial detentions over the last few years. [The figure shows an increase of custodial sentences between 1995 and 2003 (from 30,000 to 40,000) and a decrease after 2003 (to 27,000). The same pattern can be seen in the development of pre-trial detentions. However, the increase is stronger and the decrease less. The number of pre-trial detentions in 2007 is thus clearly higher than in 1995. The number of pre-trial detentions in 2007 (24,000) approaches the number of custodial sentences very closely. In 1995 the number of pre-trial detentions was roughly half of the number of custodial sentences.

The fact that the number of pre-trial detentions almost equals the number of custodial sentences does not mean that it concerns the same cases. Hence, the question is to what extent pre-trial detention cases overlap with cases in which a prison or other custodial sentence has been imposed.

It appears that most of the pre-detained prisoners are indeed convicted and sent to prison: 17,000 of the 24,000 pre-trial detainees received a custodial sentence. This is 73 percent. Of this category, in 2007 24 percent of the individuals received a sentence exactly equal to or (to a lesser extent) less than the time spent in pre-trial detention. In 1995 this was only four percent. Regarding the part that received a sentence equal to pre-trial detention, the prison sentences between two and three

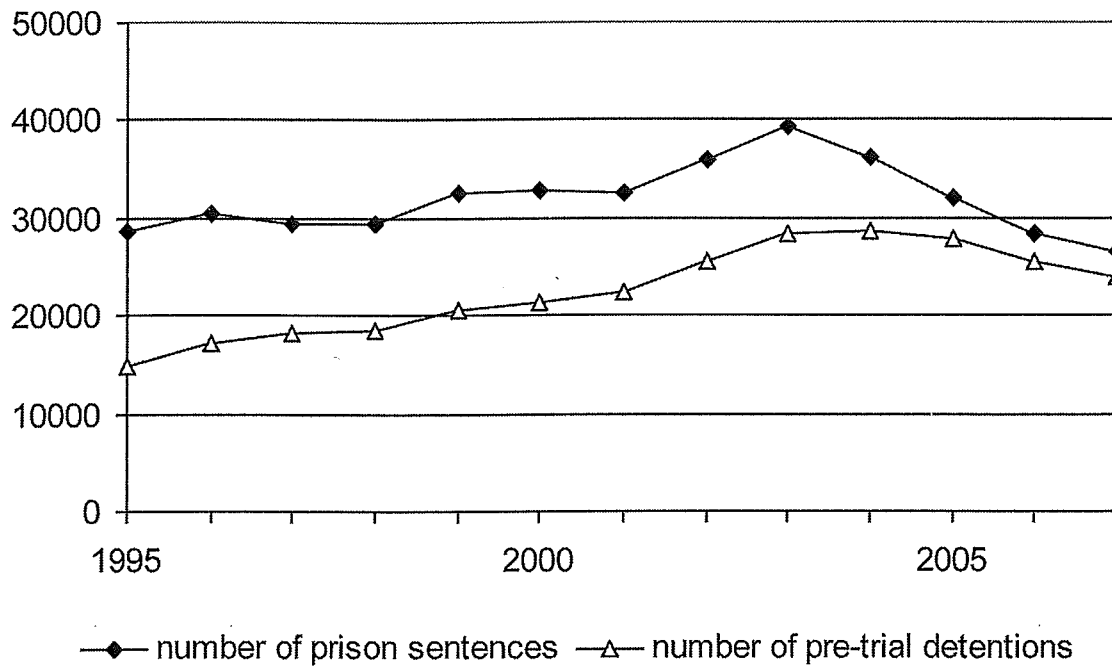


Figure 6.1 Pre-trial detentions and prison sentences, 1995–2007

weeks and those between 2 and 3 months are represented in a relatively large proportion (more than 1/4).⁸ Is it that in these cases the judge deciding on the (periods of) pre-trial detention has a fabulous intuition of the length of the sentence that will finally be imposed? Or does a remarkable coincidence occur?

Neither explanation seems plausible. My explanation would be that the sentencing judge is led by the time the accused spent in pre-trial detention. In this respect it is interesting as well that some judges stated that there are cases in which they previously would have imposed community service but now a prison sentence is imposed since the suspect had already been in pre-trial detention.

Some pre-trial detainees do not receive a prison sentence. In a sense, these suspects have done time “for nothing” because their pre-trial detention was not justified by a judgment imposing a prison sentence that can be settled by the pre-trial time. It appears that this category amounts to 27 percent, 13 percent (around 3,000) of which are pre-trial prisoners who received a non-custodial sentence, for example suspended detention, community service, or a fine) and 14 percent (more than 3,000) pre-trial prisoners who did not receive a prison sentence because they were acquitted. For this category the possibility of a very small amount of compensation exists. Warnings for rising expenses have nevertheless already been given (Buruma 2010).

In conclusion, for 27 percent of the pre-trial prisoners not given a prison sentence, the end of their pre-trial detention means the end of their confinement. The same is true for 24 percent of pre-trial prisoners receiving a prison sentence equal to the length of their pre-trial detention. This means that in more than half of

⁸ It is unfortunately not known what kinds of crimes are concerned.

the pre-trial detention cases, pre-trial detention actually determines the full length of the imprisonment. The judicial focus on adjudication as described above therefore means not only that suspects are “pre-punished,” but also that they are “finally punished.”

Pre-Trial Detention in Law and Policy-Making: Incapacitation

Section 2 illustrated the punitive use of pre-trial detention. Figures on pre-trial detention in the Netherlands support that idea. Defense lawyers who at a conference on pre-trial detention were confronted with these results reacted furiously. In their opinion judges violate the presumption of innocence and the last resort principle. The response of the judiciary is divided. Some judges acknowledge adhering to this concept of pre-trial detention, others do not, and others are of the opinion that they are part of a system they cannot fight.

The Council for the Judiciary did not take an official position on the matter. My proposition is—and I immediately admit I am not able to substantiate this by any official source—that they seem to be uneasy with the results of the interviews. Why is that? My guess would be that one of the reasons is that the interviews might suggest that judges do not obey the law. My position, however, would be that judges are properly following recent Dutch policy and that the law does not curtail them in doing so. By that I mean that judges are part of, and moving along with, a development in penal law and policymaking based on the paradigm of “being tough on crime,” which also affects pre-trial detention.

Harsh policy on crime that influences the rules on pre-trial detention in itself is not a new phenomenon (Uit Beijerse 1998). But what does seem to be a new feature is the focus this gives pre-trial detention on adjudication and incapacitation. Not only has the scope of pre-trial detention been expanded for allowing repeat offenders to be detained for petty crimes (Boone and Moerings 2007), but the policy is that these offenders are to be placed in a special Institution for Persistent Offenders (*Inrichting voor Stelselmatige Daders*) only if they are pre-detained.⁹

Another example is the approach to dealing with various types of violence, such as violence during big events like New Year’s Eve or just a regular night out. In order to demonstrate that this kind of behavior is not tolerated, and in order to make the Netherlands a safer place,¹⁰ these kinds of crimes are preferably dealt with in expedited proceedings which are only possible if a suspect has been pre-

9 The guideline of the public prosecutor’s office used to state that such treatment was only ordered *if* the suspect was pre-detained. The guideline now states the suspect is *preferably* pre-detained. Changing the words of the guideline did not, however, change the practice.

10 See for the rhetoric used by the legislature, for example the Parliamentary Documents: *Kamerstukken II* 2009/10 VI, nr. 84.

detained.¹¹ Essential within these trends is the role of the public prosecutor's office as the agency that actually implements the legislature's policies. The national public prosecutor's office issues guidelines in this context on how certain types of crime such as the violence mentioned above should be dealt with.

Besides criteria on how to settle the case and what sentence will be demanded, these guidelines usually contain a section that states that pre-trial detention should be requested. All things considered, it appears that the notion of pre-trial detention emerging from the interviews with the judges can be traced back directly to law and policymaking on dealing with certain types of crime. The purposes are to enhance security by incapacitating suspects as well as, to a lesser extent, to demonstrate that crime does not pay.

Punitive Pre-Trial Detention in Western Societies?

The assumption that pre-trial detention is used as an instrument for incapacitation has been substantiated so far by an analysis of the Dutch situation. Within the scope of this article it is not possible to scrutinize the situation in other countries at the same level. Therefore, I will now rather eclectically look into available data on the subject of pre-trial detention in Western countries.

I start with the European Union. As mentioned in the introduction, the increasing use of pre-trial detention is a problem in several European countries (Van Kalmthout et al. 2009). The same is true with regard to overpopulation of prisons. While prisons are largely occupied by pre-trial detainees, the European Commission is making efforts to reduce their number (European Commission's Green Paper on mutual recognition of non-custodial pre-trial supervision measures (COM 2004/562). Reasons that underlie extensive use of pre-trial detention can be manifold. A country may have an inadequate legal framework in which, for example, alternatives to pre-trial detention or limits on its duration are absent.

Pre-trial detention might also be routinely prolonged, or could be abused to obtain confessions (Cape et al. 2010). A first hint of the more profound reason of the "punitive attitude" as discerned in the Dutch system is found in the case law of the European Court for Human Rights. It can be seen that, in France in particular, "the seriousness of the offense"¹² continues to be an important and even decisive factor in the pre-trial detention decision (Stevens 2009: 166–7). Research conducted in France shows as well that pre-trial detention is used as a tool for

11 It is also possible for the trial to be held within the three days of police custody, preceding pre-trial detention. In that case, however, it is necessary that pre-trial detention is legally possible. Within the context of this policy, the Minister of Justice has proclaimed that legislation will be developed to expand the possibilities of the use of pre-trial detention. Parliamentary Documents II 2009/10 VI, nr. 84, section 6.

12 The gravity of the charge cannot in itself justify a long period of detention, see, for example, ECHR September 23, 1998, appl. no. 28213/95 (*I.A. v. France*), par. 104.

incapacitating suspects (Cape et al. 2010) and that pre-trial detention is based on reasons other than those recognized by law (Pager 2008), or in fact mainly hinges upon the question whether the suspect is guilty or not (Hodgson 2005: 216).

In addition, the notion of pre-trial detention as “finally punished” does not seem to be limited to the Netherlands. In France and Germany, figures are available indicating that pre-trial detention affects the sentencing decision (Langer 1997, Robert 1994: 3). Similar studies have been carried out in the United States and Australia (Williams 2003, Bamford et al. 1999). With regard to Australia, it is worth noting that punitive attitudes of police and bail granting authorities were found to be a key factor in higher remand rates in Southern Australia (Bamford et al. 1999). According to Australian scholars, this indicates, as do restrictions on bail eligibility and high remand rates, that broader penal concerns about danger and risk associated with particular types of offenders and crimes are reflected in the use of pre-trial detention (Baldry et al. 2011).

In sum, several available studies indicate that it may be assumed that punitive pre-trial detention is used in at least part of the Western world. It would be the interest of further research to look into the question to what degree and with regard to which crimes the concept applies.

Concluding Remarks

Pre-trial detention is considered a necessary evil and will always be maneuvering between principles of restricted use and practical needs for extension. The presumption of innocence holds that pre-trial detention should be a last resort and should not become punishment. Its punitive uses are, however, one of the characteristics of pre-trial detention these days. By that I mean that pre-trial detention is not a provisional “last resort” measure but an instrument facilitating a quick response to crime.

The intention of retribution can be recognized in this quick response, but even more so the idea of incapacitation. Hence, suspects serve their time before they are convicted and sentencing decisions are influenced by pre-trial detention. This is certainly the case in the Netherlands and indications are there that other countries are dealing with identical developments.

At this point, the question for lawyers is: how problematic is this practice and what could or should be done about it? Perhaps it should first be acknowledged that, in principle, a swift response to crime might not always be a bad thing in order to break through someone’s criminal patterns and in order to restore societal order. Perhaps it should also be acknowledged that the presumption of innocence is mainly rhetoric and does not provide guidance in how to shape pre-trial detention practice (Van Sliedregt 2009, Stevens 2009).

To my mind, the true predicament of incapacitation by pre-trial detention can currently be found with respect to two expanding categories of suspects. One category contains the suspects whose sentence is influenced by the length of the pre-

trial detention. These suspects are the ones who are punished disproportionately. For them it seems important that they be tried within a short time, in order not to allow pre-trial detention to lengthen their prison sentence.

The other category consists of the suspects who are eventually acquitted (Guggenheim 1990). These are the ones who are punished unjustly. For them attention should be paid to adequate compensation and to a continuous thorough assessment of the available incriminating information during their pre-trial detention. No doubt, current pre-trial detention practice faces many more problems and dilemmas. An example is the austere prison regime of pre-trial prisoners compared to the prison regime of convicted prisoners. What justifies this difference if pre-trial detention is indeed conceived as pre-punishment?

Another question that comes to mind is how incapacitation by pre-trial detention relates to other forms of preventive imprisonment of dangerous (for example, mentally ill) individuals? It seems that the concept and characteristics of incapacitation by pre-trial detention should not only be studied more deeply but more widely as well.

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